

THE LEGAL CAPACITY OF DEAF PERSONS IN THE DECISIONS OF THE IMPERIAL COURT OF JUSTICE BETWEEN 1880 AND 1900¹

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Abstract

The inclusion of deaf persons in a judicial setting raised questions about their ability to bear witness, be convicted, conclude a marriage, make a will and, of course, about the ability of the court to communicate with them. In their decisions, the judges of the Imperial Court of Justice in Leipzig shed light on their interpretation of the capacity of deaf persons to participate in the legal realm. The motivation of their judgments drew comparisons with different categories of citizens to compensate for incomplete laws. They also took into account developments in the education of deaf persons regarding their communication skills and mental capacity. The decisions illustrate that legal and scientific knowledge was closely linked to the effect that deaf persons were granted full legal capacity.

Keywords: deaf history, deaf culture, legal capacity, hearing-impaired persons, Imperial Court of Justice

Introduction

Can a deaf person bear witness? If so, is vocal communication mandatory? And can a deaf defendant be convicted who may not understand the criminal liability of his actions? These and similar questions were being discussed by the Imperial Court of Justice in late nineteenth century Germany. In our study, we will analyse how lawmakers and the highest court in Germany aimed to create a sense of national unity by redefining citizenship, as a result of which deaf persons were granted full legal capacity. The decisions of the Imperial Court of Justice favoured the values of the bourgeoisie, which ultimately restricted deaf persons yet full legal capacity required their assimilation into the hearing German mainstream, disregarding the existence of a signing deaf sub-culture. However, this did not necessarily mean that the court considered signed forms of communication of lesser value when it came to finding the truth.

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This article embraces a socio-legal approach. We focus on the first period of activity of the Court from 1879 until 1918, that is, the time following the German unification of 1871, also known as the 'Wilhelm Empire' on account of emperors Wilhelm I and II, whose successive reigns were only interrupted by the 99day rule of Frederick III in 1888. The unification of Germany in 1871 brought together 27 territories that, for the most part, were ruled by royal families, of which the Kingdom of Prussia was the most powerful. After having been defeated in World War I, the German Empire was dissolved in 1918 and the Weimar Republic founded.²

We will first provide some background on relevant legal and deaf history. As in this interdisciplinary approach we bring together different distinctive fields of historical expertise, it struck us as vital to provide some basic context to allow for legal as well as for deaf history scholars to obtain some contextual information as a basis to engage in a fruitful exchange across disciplinary boundaries. The main part of this paper introduces and discusses five civil and criminal court cases involving deaf persons between 1880 and 1900. All decisions rendered in criminal cases between 1880 and 1944 and in civil cases between 1880 and 1945 are provided online by the German Science Foundation.³ Keywords have been used to find the cases in which legal issues of deaf persons were discussed. These five cases are the only ones during the early period of the court's activity that address questions concerning deaf persons.

As this article is an interdisciplinary contribution, we provide in our references only selected literature to introduce experts from different fields of historical inquiry to important texts in the field of deaf and legal history as a background. Our main concern is to provide enough material for instance from deaf history research in order to allow for new interpretations with regard to the decisions of the Imperial Court of Justice that involve hearing-impaired persons and that might differ from the conclusions that a legal scholar might draw. Our overall goal is to find a way to bring the approaches, languages, and research from deaf and legal histories together in order to inspire new insights.

Before we delve into the subject, a note on terminology is required. The hearing status of persons who are at the centre of interest to this article has in the past and present been referred to as 'deaf and dumb,' 'deaf-mute,' 'deaf,' 'Deaf,' 'hard of hearing,' or 'hearing-impaired.' These different labels may be viewed as neutral, outdated, adequate, inappropriate, or offensive depending on who uses them, about whom, and in what context. Any sensitive

² See, for example, Gordon Alexander Craig, *Germany 1866-1945* (Oxford University Press, 2004 [1978]).

³ <http://www.rgz-rgst.degruyter.de> (accessed 12 January 2013).

discussion of the matter would require at least an article on its own. As with the Imperial Court of Justice in Leipzig we are moving in a hearing space in the past, we will, for reasons of simplicity, resort to the terms 'deaf' and 'hearing-impaired.' This is also necessary because the exact hearing-status and also the personal identity of the hearing-impaired persons in this paper cannot be determined with certainty today. On the part of the authors, there is no intention to offend with this terminology; it is a matter of suitability to our approach.

1 The Search for Legal Unity

Until the eighteenth century, a single person - typically a monarch or a ruler - authored the criminal laws of a state, kingdom, or principality. For instance, the first body of German criminal law (*Constitutio Criminalis Carolina*) was written by legal scholars at the request of Emperor Charles V and enacted in 1532. It served as the criminal code for the Holy Roman Empire, although it did not instantly replace territorial laws.⁴ In places where existing criminal laws had not yet been fully developed, the Carolina served as a guideline that ultimately reformed existing laws and the procedure in criminal matters.⁵ In the Electorate of Bavaria, ruler Maximilian III Joseph issued a Criminal Code (*Codex Maximilianeus Bavaricus Criminalis*) in 1751, and, in 1794, Prussian King Frederick II promulgated a comprehensive code of laws (*Allgemeines Landrecht für die Preußischen Staaten*).⁶

During the nineteenth century, institutional filters like Boards and Commissions were given a gatekeeper function over criminal legislation. They decided which values were to be enacted into laws, an example of which would be the German Penal Code of 1872 and the Civil Code of 1900. The nature of the filter itself reflected the beliefs of a selected few. For example, commissions were mainly composed of elite judges, professors, theologians, and prominent lawyers.⁷

The Imperial Court of Justice entered into activity on 1 October 1879, the same day as the Imperial Laws of Justice were enacted. In a tight vote (30 votes against 28 for Berlin), the federal council *Bundesrat* decided to locate the Court in Leipzig. Because there was no adequate Court building, it operated at a place called *Georgenhalle* until 1895 - the construction of a new building would take 16 years. The inauguration of the Court took place

⁴ Volker Krey, *Interrogational Torture in Criminal Proceedings: Reflections on Legal History*, Trier Inst. für Rechtspolitik, Vol. 2, (2015), p. 26.

⁵ Carl Ludwig von Bar, *A History of Continental Criminal Law*, (Little, Brown, and Company, 1916 [1882]), pp. 215-220.

⁶ Thomas Vormbaum, Michael Bohlander, *A Modern History of German Criminal Law* (Springer, 2014).

⁷ Andrew Hammel, 'Who Writes Criminal Laws? Actors, Values, and Institutions in Criminal Law Making,' *The German Journal of Law and Society*, 34 (2014), 91-124.

in the main hall of the University of Leipzig in the presence of the First President of the Court, Eduard von Simson. The Court was divided into several criminal and civil senates, whose number was decided by the Chancellor of the Empire. If a senate arrived at a decision that diverged from that of another senate, it had to refer the case to a special senate named the united senate (*Vereinigte Zivil- or Strafsenate*), whose duty was to guarantee the consistency of the decisions of the Court.⁸ The Court's organisation thus clearly reflected the goal of a unification of laws, procedures, decisions, and practice.

Judges - who were required to be at least 36 years old - were proposed by the *Bundesrat* and appointed by the Emperor. The Court dealt with questions of law, not of fact, which meant that it did not put the facts of a case on trial, but instead exclusively treated the question of which laws were to be applied and interpreted in a specific case.⁹ The decision then became a rule to be followed across the Empire. The Court clearly had the duty to unify legal decisions, which at that time still diverged from one territory to another.

The Court used the Imperial Justice Laws, a set of codes that were enacted on 1 October 1879 and - with numerous modifications - are still in use today. They covered the organisation of courts (*Gerichtsverfassungsgesetz*), the procedure in civil (*Zivilprozessordnung*) and criminal cases (*Strafprozessordnung*), as well as the costs for judicial proceedings (*Gerichtskostengesetz*). Moreover, for the first time in legal history they regulated the profession of lawyers (*Rechtsanwaltsordnung*). The main concern of the laws was therefore procedure and not substance. In accordance with the purpose of the Imperial Court, the Imperial Laws were consequently to unify the newly created Empire,¹⁰ which - so it was expected - would contribute to the consolidation of the nation against its two main rivals, France and Austria-Hungary.

The Imperial Laws limited the power of the state in order to protect citizens from the arbitrary and unrestrained use of authority. Combined with two more codes it formed the basis of the *Rechtsstaat* or state of law, defining rights and duties of the citizens, and providing a theoretical equality of treatment in the area of justice. The other two codes included one on criminal law (*Strafgesetzbuch*) that was passed in 1871 and entered into effect on 1 January 1872, although it could not be applied uniformly across the territories as the power of criminal

⁸ Kai Müller, *Der Hüter des Rechts. Die Stellung des Reichsgerichts im Deutschen Kaiserreich 1879-1918* (Nomos, 1997).

⁹ Klemens Kelmmer, 'Das Reichsgericht in Leipzig,' *Deutsche Richterzeitung*, (1993), 26-31.

¹⁰ Kenneth Ledford, 'Lawyers, Liberalism, and Procedure: The German Imperial Justice Laws of 1877-79,' *Central European History*, 26 (1993), 165-193.

justice belonged to the territorial rulers - which had been the case since the thirteenth century.¹¹ But a uniform application became possible and even a duty when the Imperial Court started its activity in October 1879. The adoption of the second code - a unique civil code (*Bürgerliches Gesetzbuch*) - took until 1896; it did not enter into effect until 1 January 1900. These two codes formed the main material laws in Germany that defined an offence in these two legal areas.

2 The Education of Deaf Persons

Enlightened philosophers had first raised the question of the educability of deaf persons in the eighteenth century, which led to a fundamental shift in the understanding of deafness. By the time of the early nineteenth century, the question was no longer whether deaf persons could be educated but how best to achieve it. In the course of the nineteenth century, two main educational models emerged whose beginnings were actually blurred and strongly overlapped: the so-called 'French' method of focusing on signed forms of communication and the so-called 'German' method of focusing on spoken language in the teaching of deaf pupils. These two different methods had their roots in the first two public schools for deaf students founded in Paris, France, in 1860 and in Leipzig, Germany, in 1878.¹² Ironically, both schools for deaf children may be traced back to attempts in sixteenth century Spain to educate deaf sons from affluent homes.¹³

It would be misleading to equate the French method with teaching national signed languages according to our contemporary understanding, for by the time of the early nineteenth century, the French were applying so-called methodical signs, which were artificially signs used to teach a vocal language such as French. Throughout the nineteenth century and in accordance with the hierarchical thinking of that time, people regarded signs as a less highly developed form of communication. Different forms of signs were recognized. Natural signs were regarded as a form of pantomime that anybody could understand. Cultivated signs represented a more complicated form of signed communication that was used among deaf people. Methodical

¹¹ Uwe Wesel, *Geschichte des Rechts: Von den Frühformen bis zur Gegenwart* (C. H. Beck, 2014), pp. 384-389.

¹² Harlan Lane, *When the Mind Hears: A History of the Deaf* (Random House, 1984); Christopher Browne Garnett (ed.) *The Exchange of Letters between Samuel Heinicke and Abbe Charles Michel de l'Epee; A Monograph on the Oralist and Manualist Methods of Instructing the Deaf in the Eighteenth Century, Including the Reproduction in English of Salient Portions of Each Letter* (Vantage Press, 1968).

¹³ Susan Plann, *A Silent Minority: Deaf Education in Spain, 1550-1835* (University of California Press [Berkeley], 1997); Leila Frances Monaghan, Karen Nakamura, Constanze Schmaling, Graham H. Turner (eds.) *Many Ways to Be Deaf: International Variation in Deaf Communities* (Gallaudet University Press, 2003); Benjamin Fraser, *Deaf History and Culture in Spain: A Reader of Primary Documents* (Gallaudet University Press, 2009).

signs were signs used according to the grammar of vocal languages. None of these concepts actually acknowledged the existence of highly evolved forms of signed language with a unique grammar on their own that equalled the grammar of vocal languages in their complexity.¹⁴

In the late eighteenth century, 'speaking deaf-mutes'¹⁵ had been considered something bordering the miraculous.¹⁶ As in the course of the nineteenth century more and more schools for deaf children opened across the western world, ideas of deafness became increasingly less wondrous and more and more scientific:¹⁷ Starting in the mid-nineteenth century, an enthusiasm for natural sciences, Darwinism, and eventually social-Darwinism as well as eugenics began catching up with deaf education. A 'hearing ideal' was seen as the most highly evolved form of civilization, the top of the hierarchy, so to speak. From this perspective, the 'survival of the fittest' meant that a 'speaking deaf-mute' person stood greater chances to become a full member of society. Empirical thinking, experimentation, and naturally scientific approaches alongside impressive 'advances in medicine' thus greatly affected the idea of deafness in the western world. Alongside the prestige that German education was by then enjoying internationally, it entailed a general shift toward the 'German' method. Signing was considered a 'lower' form of communication, and was consequently discouraged in the schools of the deaf if not outright forbidden.

By 1880, during an international congress on the education of the deaf in Milan (Italy), the mainly hearing supporters of oral education who were in attendance agreed that oralism was the preferable method of teaching at schools for the deaf. Hardly any deaf persons and hearing supporters of signed languages were present during the congress. Signing had become a

¹⁴ Renate Fischer, 'The Dictionary of the Abbé de l'Épée and His Methodical Signs', in Rolf Schulmeister and Heimo Reinitzer (eds.) *Progress in Sign Language Research: In Honor of Siegmund Prillwitz / Fortschritte in der Gebärdensprachforschung* (Signum, 2002), pp. 47-61; Renate Fischer, 'The Study of Natural Sign Language in Eighteenth-Century France', in *Sign Language Studies*, 2/4 (2002), pp. 391-406; Douglas Baynton, *Forbidden Signs. American Culture and the Campaign against Sign Language* (The University of Chicago Press 1996), pp. 113-116, 118.

¹⁵ Back then the term 'deaf and dumb' was commonly used. This term is no longer accepted today as it suggests a lack of intellectual capacity on the part of hearing-impaired persons. Moreover, deaf persons can acquire spoken language and, more important, sign languages have been internationally recognized as the languages of hearing-impaired minorities. For these reasons, it is perceived as offensive today to use the term 'deaf and dumb.' In the following, we therefore place the historical term in inverted commas.

¹⁶ See for example anonymous, 'A Remarkable Case of a Man born Deaf', in *New Wonderful Magazine and Marvelous Chronicle*, 3.25 (1 April 1794), p. 287; anonymous, 'Some Remarkable Observations on Deaf and Dumb Persons', in *New Wonderful Magazine and Marvelous Chronicle*, 5.49 (1 October 1794), pp. 103-106.

¹⁷ Anja Werner, 'Why Give Him a Sign Which Hearing People Do Not Understand...? Public Discourses about Deafness, 1780-1914', in Brian H. Greenwald and Joseph J. Murray (eds.) *In Our Own Hands. Essays in Deaf History 1780-1970* (Gallaudet University Press, 2016), pp. 1-17.

threat to society at least in the realm of education.¹⁸ The final decades of the nineteenth century witnessed a 'battle of methods' between supporters of both sides. But even in countries that had previously favoured a sign method such as France and the USA, the German oral method now dominated deaf education.

In addition to persecuting signs, some hearing people in the western world wanted to prevent deafness from spreading. Again, the Germans were at the forefront of this initiative, pushing it eventually to greater extremes than other nations. For instance, Americans debated whether deaf persons should be allowed to get married. In the early twentieth century, different western countries even enacted sterilization laws decades before the national socialists rose to power. In Germany, one of the first activities of the national socialists in 1933 was to enact a law that required persons with hereditary diseases to undergo forced sterilization. Circa.17,000 deaf persons were sterilized in Germany before 1945, the vast majority of them against their will. Recent scholarship has illustrated that at least some of these deaf victims had acquired (rather than inherited) deafness on account of an illness or accident.¹⁹

Despite these threats to deaf culture and deaf lives, it may be concluded that around 1900, deaf people in Germany and elsewhere could acquire an education and make a living provided that they agreed to live by the norms of the hearing majority. It meant to give up their natural form of communication (that is, a signed language) and to assimilate into the hearing mainstream.

3 Cases Involving Deaf Persons Tried by the Imperial Court of Justice

Our source material consists of five cases addressing the role of deaf persons in criminal and civil laws of the German Empire between 1880 and 1900. The decisions of the Imperial Court of Justice start with the question(s) addressed by the judges in the respective cases.²⁰ We will present a summary and a discussion of the cases in their chronological order:²¹

¹⁸ Harlan L. Lane, Robert Hoffmeister, Benjamin J. Bahan, *A Journey into the Deaf-World* (DawnSignPress, 1996).

¹⁹ John S. Schuchman, 'Deafness and Eugenics in the Nazi Era', in J. Vickrey Van Cleve (ed.) *Genetics, Disability, and Deafness* (Gallaudet University Press, 2004), pp. 72-78; Donna F. Ryan, John S. Schuchman, *Deaf People in Hitler's Europe* (Gallaudet University Press, 2002); Horst Biesold, *Crying Hands. Eugenics and Deaf People in Nazi Germany* (Gallaudet University Press, 1999). First published in German in 1988.

²⁰ The reference of each case is provided but paragraphs are not numbered.

²¹ Common themes are discussed in relation to specific circumstances of the individual cases.

1. How to proceed when an interpreter²² is unable to communicate with a deaf-mute defendant during the trial?²³ (*Wie ist zu verfahren, wenn ein Taubstummer angeklagt ist, ohne daß eine Verständigung durch einen in der Hauptverhandlung zugezogenen Dolmetscher gelingt?*),²⁴ Criminal Senate 1880

In this case, the judges dealt with a decision of the regional court (*Landgericht*) of Kassel to drop the criminal charges against a deaf defendant (*nolle prosequi*). A striking element in this case is that the state prosecutor rather than the defence appealed. Because of procedural violations, the Imperial Court of Justice accepted the appeal. The previous decision was cancelled and the case sent back for trial to the regional court.

The reasons for the judgment did not provide information about the offence and focused solely on the procedural matter at hand. It stated that the court in Kassel should not have decided to drop the charges because the conditions to do so in the case of an offence prosecuted on complaint (paragraph 259 of the Code of Criminal Procedure, *Strafprozessordnung*, StPO) were not fulfilled - that is, a complaint was not filed or withdrawn in due time.²⁵ In fact, the trial should not even have been pursued in the first place because the interpreter had not succeeded in communicating with the deaf defendant.

By interpreter, a sign-interpreter was meant who would have translated signs into speech and vice versa. However, after a century of public schooling for deaf children, by 1880 hearing people above all had a rather limited understanding of forms of signed communications - more research is needed today to explore the meaning of sign language and sign translation back then. Generally, in the hearing world, signs were thought to be a type of pantomime. Most teachers of deaf students were dubious about the existence of signed languages and

²² As we will show below, there were no formally trained sign-language interpreters in those days. We therefore use the terms 'interpreter' and 'translator' interchangeably to remind the reader that these translators were layman without a proper training who might not even apply the same sign system as the deaf person in question.

²³ We translated ourselves the court cases as well as quotes from laws. Legal terminology reflects specific national developments and contexts. It often lacks adequate equivalents in another language. We therefore focused on translating the meaning in each instance. As a result, depending on the context, German terminology may not always be rendered with the same phrase in English.

²⁴ Reichsgericht, III. Strafsenat. Urt. v. 10 November 1880 g. L. Rep. 2488/80.

²⁵ StPO, §. 259. *Die Hauptverhandlung schließt mit der Erlassung des Urtheils. Das Urtheil kann nur auf Freisprechung, Verurtheilung oder Einstellung des Verfahrens lauten. Die Einstellung des Verfahrens ist auszusprechen, wenn bei einer nur auf Antrag zu verfolgenden strafbaren Handlung sich ergibt, daß der erforderliche Antrag nicht vorliegt, oder wenn der Antrag rechtzeitig zurückgenommen ist.* (The main hearing closes with the pronouncing of the judgment. The judgment can only mean acquittal, conviction or termination of the proceedings. In the case of a criminal offence that may be prosecuted only upon application, the termination of the proceedings is pronounced when it becomes apparent that the necessary application is not provided or when the application is withdrawn on time.)

considered any sign system a form of communication that was inferior to spoken speech. It was even assumed that anyone could understand the allegedly simple 'natural signs' as opposed to more complicated cultivated or methodical signs. The latter did not signify a signed communication in itself but rather a means to convey vocal speech with the help of signs. Back then, forms of methodical signs were used by teachers of the deaf to teach vocal speech. Consequently, there was no standardized training for sign interpreters. An acquaintance with a deaf person or a contact with a deaf family member sufficed to be called upon as a sign language interpreter. However, as deaf persons often lived isolated lives without much contact with other deaf persons, they would develop individual sets of signs. The more deaf persons who lived nearby, the faster their signed communication developed, especially if deaf children and thereby a second generation of signers was part of the group, which is why boarding schools were and are so central for deaf culture.²⁶ Boarding schools helped to merge individual sign systems. In addition to personalized sets of signs - rather, as a result of their diversity - different sign dialects have existed and evolved in Germany for a long time. A systematic standardization of German sign language (*Deutsche Gebärdensprache*, DGS) did not occur until the 1980s.²⁷ A nineteenth century hearing person who had learned signs in contact with one deaf person was likely not to understand the individual signs of another.

With regard to the instant case, the judges of the Imperial Court of Justice argued that a verdict should not have been rendered since this would have required a proper procedure of the trial and, ironically, the hearing. But as the defendant had not succeeded in communicating through the translator, he could not exercise his right to comment after the presentation of the testimony. Neither could he have the last word of the trial, which by law belonged to the defendant even if a lawyer represented him. The judges of the Imperial Court of Justice referred to paragraph 203 of the Code of Criminal Procedure, which gave two motives for a provisional closing of the proceedings: the absence of the defendant or a mental illness that emerged after the illegal act had been committed.²⁸ The judges concluded that the lower court should have temporarily closed proceedings until the problem of translation had been explored thoroughly.

²⁶ Baynton, *Forbidden Signs*; Ylva Söderfeldt, *From Pathology to Public Sphere: The German Deaf Movement 1848-1914* (Transcript, 2013).

²⁷ Siegmund Prillwitz, *Skizzen zu einer Grammatik der Deutschen Gebärdensprache* (Forschungsstelle Deutsche Gebärdensprache, 1985); Schulmeister and Reinitzer (eds.) *Progress in Sign Language Research*.

²⁸ StPO, §. 203. *Vorläufige Einstellung des Verfahrens kann beschlossen werden, wenn dem weiteren Verfahren Abwesenheit des Angeeschuldigten oder der Umstand entgegensteht, daß derselbe nach der That in Geisteskrankheit verfallen ist.* (A provisional termination of the proceedings may be decided when a continuation of the proceedings is prevented by the absence of the defendant or by the fact that he succumbed to mental illness after the [criminal] act.)

For a lack of specific information about deafness, the inability to communicate was either regarded as proof of the defendant's absence or a mental illness on his part. This connects with an older image of deafness. Before the institutionalization of schools for the deaf in the eighteenth century, deaf persons could be placed in asylums with the mentally ill likely because they appeared to be mentally deranged for a lack of speech. Deafness may be accompanied by mental disabilities, but that is not the rule.²⁹ Be that as it may, the judges concluded that a translator might succeed in adequately communicating with the defendant, though they would not search for a translator themselves. For, if such a search were successful, the provisional closing of the proceedings could be withdrawn and the trial resumed. The Imperial Court of Justice therefore cancelled the previous decision and sent the case back to the court in Kassel for a new decision.

2. Ability of deaf-mute persons to make a will (*Testierfähigkeit taubstummer Menschen*), Civil Senate 1887

1. *Under which conditions and in which way may deaf-mute persons make a will? (Unter welchen Voraussetzungen und in welcher Form können Taubstumme testieren?)*
2. *If a person was born deaf or lost their hearing before the age of fourteen, do they need assistance when formulating a will? (Bedürfen solche Personen, welche taubstumm geboren oder es vor zurückgelegtem vierzehnten Lebensjahre geworden sind, bei Errichtung eines Testamentes zu gerichtlichem Protokolle eines Beistandes?)*³⁰

This appeal regarding a case about an inheritance dealt with a decision that had been rendered by the higher court (*Oberlandesgericht*) of Breslau. As this case took place before the Civil Code entered into force in 1900, the judges used the General State Laws for the Prussian States (*Allgemeines Landrecht für die Preußischen Staaten, ALR*), which had been promulgated in 1794. The defendant was a woman divorced from a man whose deaf brother, the testator, was deceased. Deafness had followed an injury at the age of four, and he had remained deaf until his death. He had left his entire inheritance by testament to the one of his two brothers who was not the defendant's ex-husband. The defendant had previously claimed money from her ex-husband, who would not pay her because he had not received a part of the inheritance. The divorced wife had then entered a lawsuit to seize the inheritance of her ex-husband's brother who was in charge of the whole legacy. Moreover, she claimed that he was not the sole heir and that her ex-husband should also receive a part of the legacy. Her

²⁹ Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* (Pantheon Books, 1965). First published in French: Michel Foucault, *Histoire de la folie à l'âge classique: folie et déraison* (Union Generale d'Editions, 1961).

³⁰ Reichsgericht, Zivilsenat, 9 Juni 1887 Rep.. IV 113/87, RGZ 018, 301-308.

ex-husband's brother, in turn, as the plaintiff, made a claim against the seizure of the inheritance, arguing that according to his deaf brother's testament he was the only heir. The lower court had reached a decision against the divorced wife (no further details). She now appealed to contest the previous decision.

The laws of Prussia stated that deaf or mute persons, who were born so or became deaf before the age of 14, were capable of making a will if they could read and express themselves in the written or spoken language.³¹ In the civil matter of inheritance, deaf persons therefore had legal capacity and thus the same rights as hearing persons as long as they were able to communicate in spoken or written language. The decision of the lower court pointed out that blind, deaf, or mute people had the legal capacity to conclude contracts if they were able to express a will clearly and reliably. The possible incapacity to make a will was not based on the assumption of a mental defect, but on a physical deficiency that resulted in an inability to express one's will.

Individuals who were born deaf and/or mute as well as persons who had acquired this condition before the age of 14 were placed under state guardianship as soon as they were no longer under the authority of their fathers. The legislator assumed that this category of citizens lacked the capacity to express itself. Such incapacity of expression was taken to mean that the person was completely unable to look after their own affairs. If an individual became deaf or mute at a later age, a guardianship was imposed only if the person in question was not able to express their thoughts with common understandable signs, which would correspond to what was then called 'natural signs' or pantomime. In fact, if a deaf person - and it was more likely for postlingually deaf persons - acquired a high proficiency of vocal language, they could even serve as legal wardens for their 'less fortunate' deaf brethren. Eduard Fürstenberg was a case in point. A leader of the deaf in the mid-nineteenth century Germany, he functioned very well in the 'hearing world' and was guardian of some 50 deaf persons. He also initiated the first deaf club in Berlin in 1848.³² The example shows that as long as one fit in with the hearing world, one could also be a deaf activist and move in signing circles.

The judges of the Imperial Court of Justice pointed out that the territorial differences lost their relevance after the new regulation of guardianship (*Vormundschaftsordnung*) had entered into

³¹ ALR, §. 26. *Tauben oder stummen Personen, welche sich schriftlich oder mündlich ausdrücken können, stehen die Gesetze bey Errichtung ihres letzten Willens nicht entgegen.* (There are no legal obstacles to the making of a will by deaf or mute persons who are able to express themselves in written or oral form.)

³² Söderfeldt, *From Pathology to Public Sphere*, pp. 55-56, 111-115.

force in 1875; it abolished all previous ones in the general effort of legal unification. The 1875 regulation stipulated that adult deaf, mute, or blind persons would be placed under guardianship if they were unable to exercise their rights. The inability should be determined in individual cases after a follow-up examination by the court of guardianship. In the case at hand, the testator had not had a guardian. It was also undisputed that he could write and read, and that, consequently, he could have answered the court legally in the written language (an accepted form of the vocal language) regarding questions about his will. In fact, the testator had replied to written questions in the spoken language, and his answers were recorded in the official transcript of the court. After reading the transcript, the testator had approved his answers. The judge of appeal concluded that at the moment of the testimony, the testator had merely been deaf but not mute, since he was able to make himself understood perfectly in spoken language (though only with the guttural tones of the deaf-mute persons). He was therefore an example of a 'speaking deaf-mute' who was well adjusted to the hearing world.

The defendant had pointed out to the previous court that a major problem of the testament was that it did not show with certainty if the deaf testator had answered in spoken or written language to the questions presented to him in the written form. For the Imperial Court of Justice, this objection was unfounded, because if the testator had really been deaf *and* mute which would have meant that he had answered in the written language, the formal points required by the laws of Prussia in paragraph 123 of Section 12 would still have been observed perfectly.³³ There was no evidence that the testator had made himself understood merely by sign language, neither did the defendant claim that he had done so. A use of signs would have jeopardized the validity of the testimony, as they might not have been interpreted correctly. The judge of appeal at the higher court of Breslau had been specific in his introductory speech:

Mister Wilhelm Julius N. wants to clarify his testament to the court; since he is hard of hearing [*schwerhörig*] and almost completely mute, but he can read the written language, the questions addressed to him will be written word by word in the transcript that he will read and answer.

In this instance, the transcript of the previous court defined the person in question as 'hard-of-hearing' rather than deaf. The difference is crucial, for it meant that the testator might have been able to understand spoken speech to some extent, which could account for his reading

³³ ALR, §. 123. *Tauben, ingleichen Stummen, die an sich testieren können: (§. 26.) müssen die an sie zu richtenden Fragen schriftlich vorgelegt, und wenn der Testator stumm ist, auch schriftlich von demselben beantwortet werden.* (The deaf and also the mute who are able to make a will must be given questions in the written form, and, in cases when the testator is mute, must answer in writing.) §. 26. *Tauben oder stummen Personen, welche sich schriftlich oder mündlich ausdrücken können, stehen die Gesetze bey Errichtung ihres letzten Willens nicht entgegen.* (There are no legal obstacles to the making of a will by deaf or mute persons who are able to express themselves in written or oral form.)

and writing skills. Hard-of-hearing persons tend to grasp written language more easily than genuinely or prelingually deaf persons.

By suddenly switching to another denominator for the deaf person in question, the court case reflects the uncertainties and arbitrariness of defining a hearing loss. In other words, deafness is also very much in the eye of the beholder. The idea of hearing-impairments is often portrayed as a field of different, mutually exclusive categories such as deaf, not deaf or hard-of-hearing. To be true, hearing loss is always gradual. Most deaf and hard-of-hearing persons have more or less residual hearing. It is not the level of residual hearing that determines a person's hearing status but rather an external label and/or a personal decision on the part of a hearing-impaired person: Contact with more deaf, signing people as contrasted by contacts with more hearing and orally educated people will result in a person's decision to identify as deaf, hearing-impaired, or hard-of-hearing.

In this case, the testator's answers had been communicated in fully understandable spoken language and dictated by the judge for transcription. The completion of the testament did not require any other action. The judge of the lower court had thus accepted the validity of the testament on the basis of the specific contents of the court transcripts and the testament itself. The Imperial Court of Justice therefore confirmed the previous decision of the higher court in Breslau, which went against the claim of the divorced defendant.

The fact that the testator had lost his sense of hearing because of an injury at the age of four could not constitute an objection to his ability to make a will orally, because he had acquired the capacity to express himself and articulate properly as the result of a successful education at an institution for 'deaf-mute' persons. Insofar as the incapacity to make a will involved a deficit of a physical faculty, it necessarily stopped with the removal of that deficit by means of education. The locus of deafness changed from the mind (with its correlate of mental illness) to the body (as in a physical malfunction that could be corrected). By focusing merely on successful teaching, the judges emphasized that the age at which a person became deaf did not matter. Education gained merit; even deaf newborns might acquire speech and thereby a legal status in the hearing world. The decision to reject the defendant's appeal may therefore be linked to developments in teaching methods for the deaf. If a deaf person had learned to speak in an understandable way, it was now legally irrelevant that medicine defined such a person as physically infirm. The position of the medical science could not simply be transferred to the legal realm. In this legal case, the testator, whose mental health the defendant did not question, had been able to check the transcript of his spoken answers and approve them. Hence, for the Imperial Court of Justice, there could be no doubt that the previous court had

understood his answers correctly and that he had been mentally and linguistically capable of making a will.

The last point that the defendant's appeal raised was that the 'deaf-mute' testator should have been accompanied by an assistant during the proceedings and that the judge of the lower court should have considered the presence of such an assistant necessary.³⁴ The Imperial Court followed the previous court's decision and rejected this point: The testator could express his thoughts clearly in written and spoken language. He was not limited in his ability to express himself and consequently could not be considered to be 'mute.' An assistant was required only in cases where the 'deaf-mute' person had not learnt to communicate with words but only with signs. Such people did not necessarily have a mental problem but were simply unable to express their thoughts in vocal speech. In conclusion, the judges rejected the appeal and argued that 'deaf-mute' people who can write are also able to make their last will without any assistance.

3. If a deaf defendant is convicted, does it have to be ruled explicitly that the defendant possessed the necessary mental capacity to understand his criminal liability? (*Muß im Falle der Verurteilung eines taubstummen Angeklagten ausdrücklich festgelegt werden, daß der Angeklagte die zur Erkenntnis der Strafbarkeit erforderliche Einsicht besessen habe?*),³⁵ Criminal Senate 1892

The Criminal Senate introduced the case by highlighting that the previous court, the regional court of Ratibor, had convicted a defendant described as 'deaf-mute' without establishing if he could understand his criminal liability. The Imperial Court of Justice stated that the appeal rightfully found an infringement of paragraph 58 of the Criminal Code, which stated that any 'deaf-mute' person had to be acquitted if he did not possess the understanding of the criminal liability of his act.³⁶ The judges pointed out that this paragraph was connected to paragraph

³⁴ ALR, §. 17. *Denjenigen hingegen, denen der Mangel der Sprache und des Gehörs den Ausdruck ihrer Gedanken und die Besorgung ihrer Angelegenheiten nur erschweret, soll wider ihren Willen kein Vormund bestellt werden.* (No guardian shall, however, be appointed against the will of those who lack language and hearing and, on account of that, face obstacles in expressing their thoughts and in the dealing with their affairs.)

§.18. *Doch sind sie bey gerichtlichen Verhandlungen einen Beystand zuzuziehn verbunden.* (But they are to hire assistance for trials.)

³⁵ Reichsgericht, IV. Strafsenat. Urt. v. 2 Dezember 1892 g. R. Rep. 3508/92.

³⁶ StGB, § 58. *Ein Taubstummer, welcher die zur Erkenntniß der Strafbarkeit einer von ihm begangenen Handlung erforderliche Einsicht nicht besaß, ist freizusprechen.* (A deaf-mute is to be acquitted if he did not possess the necessary mental capacity to understand the criminal liability of an act that he committed.)

56, which stated that an explicit understanding was also required in the case of minors.³⁷ A parallel was drawn between deaf persons and persons under the age of 18; both groups were not (yet) considered fully legally responsible. By doing so, the judges emphasized and protected the rights of the defendant. It meant that the Imperial Court of Justice had moved away from its above-mentioned approach, that is, the 1880 decision, in which it had applied the Code of Criminal Procedure (paragraph 203) to draw an analogy between a deaf defendant and an absent or mentally ill defendant. Judges of the Imperial Court obviously solved the lack of available laws about deaf persons by finding parallels with existing categories of legal entities: minors, absent defendants and mentally ill persons.

The criminal law was built on the assumption that each 'normally organized human being' (Reichsgericht, IV. Strafsenat, 1892, Rep. 3508/92) who attained the age of mental and moral maturity, that is 18 years of age, had the necessary capacity to understand the criminal liability of an act. For this reason, judges could, in general, neglect to make this point explicit in the motivation of their decisions. In cases where this assumption failed, judges were obliged to make explicit that this understanding was nonetheless present. In order to emphasize the importance of understanding the criminal nature of an act, the Imperial Court of Justice could resort to paragraph 298 of the Code of Criminal Procedure³⁸, which also likened minors to 'deaf-mute' defendants. The decision of the Imperial Court of Justice confirmed that a clear statement about the understanding of the criminal liability was comprised in the paragraphs 56 and 58 of the Criminal Code (see above, notes 11 and 12). In connection with paragraph 57, which listed the punishments applied to a guilty minor when he understood the criminal

³⁷ StGB, § 56. (1) *Ein Angeschuldigter, welcher zu einer Zeit, als er das zwölfte, aber nicht das achtzehnte Lebensjahr vollendet hatte, eine strafbare Handlung begangen hat, ist freizusprechen, wenn er bei Begehung derselben die zur Erkenntniß ihrer Strafbarkeit erforderliche Einsicht nicht besaß.* (An defendant, who committed a criminal act after completing his twelfth but not his eighteenth year, is to be acquitted if at the time of the commission of the offence he did not possess the necessary mental capacity to understand its criminal liability.)

³⁸ StPO, §. 298. *Hatte ein Angeklagter zur Zeit der That noch nicht das achtzehnte Lebensjahr vollendet, so muß die Nebenfrage gestellt werden, ob er bei Begehung der That die zur Erkenntniß ihrer Strafbarkeit erforderliche Einsicht besessen habe. Dasselbe gilt, wenn ein Angeklagter taubstumm ist.* (If a defendant had not yet completed his eighteenth year when he committed a crime, the side issue will have to be clarified whether upon committing the offence he possessed the necessary mental capacity to understand its criminal liability. The same applies when the defendant is deaf-mute.)

nature of his wrongdoing,³⁹ these two paragraphs underlined the necessity to determine whether a deaf defendant understood this point. Since the previous court had not made explicit that the deaf defendant had understood the criminal nature of his act, the appeal of the defence was accepted and the case sent back for a new trial.

4. Formal requirements for the marriage of a deaf person (*Formelle Erfordernisse einer Eheschließung taubstummer Personen*)⁴⁰, Criminal Senate 1899

In 1899, the second Criminal Senate of the Imperial Court of Justice rendered a decision about formal requirements for the marriage of deaf persons. An earlier regulation dated 1876 had abolished the exclusive control of the clergy on these matters and replaced it with an obligatory state authentication. The way in which this state procedure was performed constituted the central point of this appeal to the Imperial Court of Justice. All of this occurred at a time when eugenics were on the rise in the western world, in which context a debate had been initiated about whether deaf persons should be allowed to marry (and thus to create potentially deaf offspring). A side-product of Alexander Graham Bell's (best-known for his invention of the telephone) experiments to aid deaf persons called attention to the 'problem' in the early 1880s in a paper entitled 'Upon the Formation of a Deaf Variety of the Human Race.'⁴¹ Bell was not opposed to deaf persons getting married yet he argued that they should be discouraged from doing so by integrating them into the hearing world.⁴²

The case in question concerned a deaf man and a hearing woman who had previously been sentenced by the regional court of Berlin according to paragraph 171 of the Criminal Code.⁴³

³⁹ StGB, § 57. (1) *Wenn ein Angeschuldigter, welcher zu einer Zeit, als er das zwölfte, aber nicht das achtzehnte Lebensjahr vollendet hatte, eine strafbare Handlung begangen hat, bei Begehung derselben die zur Erkenntniß ihrer Strafbarkeit erforderliche Einsicht besaß, so kommen gegen ihn folgende Bestimmungen zur Anwendung: 1. ist die Handlung mit dem Tode oder mit lebenslänglichem Zuchthaus bedroht, so ist auf Gefängniß von drei bis zu fünfzehn Jahren zu erkennen; (...).* (If a defendant, who at the time when he committed a criminal act, had completed the twelfth but not the eighteenth year, possessed at that time the necessary mental capacity to understand its criminal liability, the following regulations apply: 1) if the offence is punished by death or a life sentence, the sentence shall be imprisonment from three to fifteen years; (...).

⁴⁰ II. Strafsenat. Urt. v. 20 Januar 1899 g. Z. Rep. 4774/98.

⁴¹ Alexander Graham Bell, *Upon the Formation of a Deaf Variety of the Human Race* (National Academy of Sciences, 1884).

⁴² Brian H. Greenwald, 'Revisiting Memoir Upon the Formation of a Deaf Variety of the Human Race: Alexander Graham Bell and Deaf Autonomy', in Greenwald and Murray (eds.) *In Our Own Hands*, pp. 149-170.

⁴³ StGB, § 171. (1) *Ein Ehegatte, welcher eine neue Ehe eingeht, bevor seine Ehe aufgelöst, für ungültig oder nichtig erklärt worden ist, ingleichen eine unverheirathete Person, welche mit einem Ehegatten, wissend, daß er verheirathet ist, eine Ehe eingeht, wird mit Zuchthaus bis zu fünf Jahren bestraft.* (A spouse who remarries before the marriage was annulled, declared invalid or illegal, as well as an unwed person who marries a spouse knowing that the person is already married, will be punished with imprisonment of up to five years.)

The paragraph condemned bigamy, and the original text would actually remain in place until 1969 when only the punishment was slightly modified in order to include a minimum sentence of one year (the maximum sentence remained five years). With regard to the 1899 case, the deaf man had exchanged vows at the civil registry office in 1898 before his first marriage had been cancelled. The judges stated that the previous court had established that the wife knew of her husband's married status. They also adopted the position that the husband had understood the criminal nature of his act. This point refers to the paragraph 58 of the General Part of the Criminal Code, which explicitly speaks about deaf people and the legal consequences of an act that they committed (see our third case from 1892). Moreover, the husband could read and write, and the registrar had communicated with him in writing.

The appeal argued that the official document from the civil registry office was not valid. In other words, the second marriage was not binding, and the Imperial Court should therefore revoke the lower court's convictions of both defendants for bigamy. However, why would the defence consider the official document of the marriage invalid? Both the questions of the official as well as the declaration of the deaf husband that he wished to conclude the marriage were done in writing. The same applied to the sentence that declared the couple legally married, which was not performed in a simple 'stream of words' but in a way that could be understood by both persons getting married. The requirement of the oral pronouncement of the state official, which constitutes the basis of the legal conclusion of a marriage, had thereby been replaced by a written communication. The appeal contested precisely this point and said that the oral declaration of the registrar about the persons getting married could not be replaced by any other form of communication. While contracts were usually concluded in a written form, this argument gives a unique and absolute authority to the oral language in order to try to reverse the conviction of the lower district court. This standpoint appears to be a strategic move in order to obtain the cancellation of the previous decision by arguing that the second marriage had never been concluded between the two persons.

The judges of the Imperial Court stated that the regulation dealing with the authentication of the civil status and the marriage did not provide any special indication in the case of deaf, mute, or 'deaf-mute' people, as well as for people who did not speak German. The comparison of deaf people with persons who could not speak German did not emphasize any mental limitation of the deaf, but the absence of a shared oral language, which turned a deaf person into a type of foreigner. This point is significant as the court resorted to a cultural rather than a medical definition of deafness. The judges argued that it meant that deaf, mute, or 'deaf-mute' people could conclude a marriage as long as a communication between them and the official was possible, allowing the procedure detailed in the regulation to take place regardless

of the form of language that was used. The court did not insist on the differences between categories of citizens such as hearing and deaf persons but considered the possibility to communicate with them as central, which was an important step towards the ideal of an equal treatment of all citizens.

To give more weight to their argument, the judges observed that the way in which communication should be conducted was not restricted to oral or written language, but that even a sign language could be included in the regulation although, as we have seen before, the idea of 'sign language' was unclear in the context of the times and most likely referred to a form of signed vocal language. Imprecision in defining communication consequently played in favour of the deaf as long as they found *any* way to exchange ideas with the hearing official.

In accordance with the legal situation, the judges of the Imperial Court argued that the official in Berlin had legally concluded the marriage. The appeal was therefore rejected and both defendants remained convicted. Interestingly, the defence tried to convince the judges of the lack of validity of the marriage, which would have meant to discriminate against deaf people who were unable to read lips and articulate even if they could communicate in a written way with the official. Although this sentence was not in favour of the accused, it legally treated the deaf husband as equal with a hearing person, because the focus was on comprehending the procedure in any way and on understanding the criminal nature of a second marriage.

But judges also stressed the importance of the marriage for deaf citizens and defended this institution by not revoking the punishment for bigamy of both partners - the hearing and the deaf. It is an example of the fact that deafness was secondary when central social institutions were at stake and deaf persons were able to communicate in and with the hearing world. For a deaf person to communicate in spoken or written language meant to support hearing society rather than becoming a member of a signing community with a culture of its own. A 'speaking deaf' person did not present a threat in the form of a 'strange' counter-culture to hearing society and therefore was a non-issue when other foundations of the mainstream society were at stake, such as matrimony.

5. Can a deaf-mute person bear witness if he is not able to read and write, if he does not understand the interpreter's signs, and, as a result, cannot be put under oath? (*Welche Bedeutung als Beweismittel hat ein Taubstummer, der des Lesens und Schreibens sowie der*

Zeichensprache des Dolmetschers unkundig und dessen Beeidigung darum unmöglich ist?),⁴⁴
Criminal Senate 1900

During a trial in the regional court of Regensburg, a 'deaf-mute' witness, Joseph, appeared in court. He could not read and write, nor did he know what was termed the 'sign language.' Moreover, he was unable to read lips and articulate. As a result, he could not understand the interpreter that had been appointed by the court, who was the director of an institution for 'deaf-mute' persons. Joseph had consequently not been sworn in before he was heard as a witness. The reasons of the previous court pointed out that the failure to put the witness under oath was not due to doubts concerning his intellectual skills but because of an objective impossibility to take an oath⁴⁵. The deaf witness' adroit mimic account nevertheless offered a clear picture of the event, and the court used his testimony besides other pieces of evidence as a basis for its decision.

The specific point that was brought to appeal at the Imperial Court was that, because no oath had been taken, the hearing of this witness should have been omitted. The Code of Criminal Procedure mentioned in paragraph 56 a number of cases in which the hearing of an unsworn witness could legally be done, but this particular constellation was not listed.⁴⁶ In this case, the deaf witness was neither compared with a minor nor with a person who lacked the ability to understand the meaning of an oath, which could have solved the issue at hand and transformed him into an unsworn witness who could legally be heard by the court. These categories (of minors and of mentally limited persons) had been used in 1880 and 1892 to resolve cases involving deaf defendants when laws did not provide any specific information. In this case, however, the judges could rely on an existing paragraph that gave an explicit account of the procedure to follow with 'mute' persons ('deaf' was not used): Those who can write will read the oath and sign it, those who cannot write will take the oath with the help of a sign-interpreter.⁴⁷

⁴⁴ Strafsenat. Urte. v. 15 Oktober 1900 g. Pf. Rep. 2822/00.

⁴⁵ StPO, §. 62. *Der Eid beginnt mit den Worten: „Ich schwöre bei Gott dem Allmächtigen und Allwissenden“ und schließt mit den Worten: „So wahr mir Gott helfe“.* (The oath begins with the words: 'I swear by God the Almighty and Omniscient' and closes with the words: 'So help me God.')

⁴⁶ StPO, §. 56. *Unbeeidigt sind zu vernehmen: 1. Personen, welche zur Zeit der Vernehmung das sechzehnte Lebensjahr noch nicht vollendet oder wegen mangelnder Verstandesreife oder wegen Verstandesschwäche von dem Wesen und der Bedeutung des Eides keine genügende Vorstellung haben; (...).* (Persons who are to be heard without an oath: 1) persons who at the time of the hearing have not yet completed the sixteenth year or who lack mental maturity or who, for mental weakness, do not have a sufficient understanding of the nature and meaning of an oath; (...))

⁴⁷ StPO, §. 63. *Der Eid wird mittels Nachsprechens oder Ablesens der die Eidesnorm enthaltenden Eidesformel geleistet. Der Schwörende soll bei der Eidesleistung die rechte Hand erheben.* (The oath is to be administered by repeating or reading the oath. The person swearing the oath shall raise the right hand.)

The judges of the Imperial Court confirmed that the procedure concerning the hearing of a witness was precisely spelled out in the Code of Criminal Procedure and that the previous court had not had the power to widen the circle of exceptions listed in paragraph 56. The consequence of these statements by the judges of the Imperial Court was merely that the deaf witness could technically not be considered a witness; it was *not* that the court should not examine and use his declaration. By contrast, nothing spoke against the fact that judges could rely on auxiliary evidence, which can be 'more important and convincing than the flow of words of some sworn witnesses' (I. Strafsenat, Rep. 2822/00, p. 403-404). The gestures of a 'deaf-mute' person were compared with the nonverbal communication of a 'normal' person (expressions of confusion, fear, impartiality, shame). The latter were mentioned as bringing more clarification to the facts than the speech that accompanied them. The lack of mentioning the admissibility of such evidence in the code of procedure was explained by the argument that it did not need a special rule because the aim of a trial was to determine the truth by every means possible without hurting higher interests that had to be taken into account. Precisely for this reason, the code of procedure did not restrict judges to specific types of evidence that they should consider in order to come to a decision. Even though the judges could not consider Joseph's mimics as an official hearing of a witness, they could still include his mimic account as valid evidence.

The decision highlights the fact that the testimony of deaf witnesses in court could not officially be integrated in the legal system if they could not take an oath. But it also shows that they were not excluded from the hearings either, for they could still help resolve a case, which remained the highest purpose of a trial. Judges of the Imperial Court pointed out the difference between the vocal, written, and signed languages, all of which allowed a person to be heard as a sworn witness, in addition to which they included the use of gestures or mimics. This distinction into different modes of expression built a double hierarchy in the arguments of the judges, which actually accorded gestures a higher authority than words: They could be more valuable than speech. This decision made an obvious attempt not to lose a type of evidence that could serve the idea of justice, even if the code of criminal procedure could not be applied.

From the perspective of deaf studies, this decision is remarkable: While hearing experts such as teachers of the deaf and physicians insisted that human communication was hierarchical

Stumme, welche schreiben können, leisten den Eid mittels Abschreibens und Unterschreibens der die Eidesnorm enthaltenden Eidesformel. (The mute who know how to write take the oath by writing down and signing the form of oath.)

Stumme, welche nicht schreiben können, leisten den Eid mit Hilfe eines Dolmetschers durch Zeichen. (The mute who do not know how to write take the oath by signs with the help of an interpreter.)

with hearing culture - that is vocal language and its written form - at the top of the pyramid, the decisions of judges of the Imperial Court actually point in another direction. That is, in order to serve justice, words at times are simply not enough. This is significant for teachers of the deaf: a gesture or a sign, a pantomime and the physical expression of an emotion could tell more, and more emphatically, about what happened. While from a legal point of view, judges of the Imperial Court might not have been aware of the revolutionary potential of their decision, it actually stressed the importance of nonverbal communication and thus suggested the force and possibilities of signed communication. It happened long before linguists seriously started to study signed languages systematically and thus provided a basis for deaf persons in the twentieth century to officially and publically reclaim their language and culture as clearly distinct from the hearing world.

Conclusion

Especially with regard to German contexts, deaf history is still in its infancy; scholarship on this subject is comparatively more advanced in the USA and in Scandinavian countries. In dealing with deaf history, scholars to date have focused on medical, linguistic, and social approaches. However, our article illustrates that legal history and an examination of historic court cases can add depth and new perspectives to our understanding of deaf history and thus of history at large.

Between 1871 and 1918, German principalities, kingdoms, and states united, and attempts were made to create a unified country. Laws and their implementation as well as a judicial review were essential for that undertaking. The early activities of the Imperial Court of Justice between 1879 and 1918 illustrate that examining the application of laws to persons with hearing impairments provided ways to (re-)define values of society that, almost as a side product, simultaneously granted deaf persons a new status. This new status did not exactly match the categories that hearing physicians and teachers of the deaf applied, who considered deafness a deviation from the hearing norm and signs an inferior way of communication. By contrast, the Imperial Court established, for instance, that signs and nonverbal expressions could be more important than words in searching for truth. Rather than defining a deaf person as a hearing person with a physical deficit, the Imperial Court likened them to foreigners with a different cultural and linguistic background. It consequently defined deafness according to a cultural rather than a medical concept.

In procedural matters, the first criminal case underlines the importance of finding a sign language interpreter who could actually understand the signs of the deaf defendant and communicate the proceedings of the court to him. Since the lower court had not provided such

an interpreter, the Imperial Court decided that the trial should be temporarily closed without rendering a verdict. The rights of the defendant were to be respected exactly in the same way as those of a hearing defendant. Our only civil case adopted a similar perspective about a deaf man whose testament had been applied regardless of the type of language (written or spoken) that he had used to express his will: If the officials could communicate with the deaf person, his inheritance rights were the same as those of a hearing testator. It is noteworthy that of all our cases presented here, the term 'hard-of-hearing' was used for the first time in this case. The second criminal case (our third sample case) protected the rights of the defendant by deciding that the criminal liability of a deaf person had to be established explicitly (and not merely assumed) before rendering a verdict. In doing so, the judges shaped a new legal entity based on the social status of deaf people: They could be tried, make a will, or conclude a marriage (see our third criminal case, that is, the fourth sample case) if they were able to communicate in a written or spoken form with the hearing world. If a way to communicate was not found by the courts, the rights of deaf persons were protected by the decisions of the Imperial Court of Justice. Then again, this meant that they could be convicted if the requirement of being able to communicate with the hearing world was met. The conviction for bigamy of a deaf husband illustrates this point: Because the deaf man could communicate with the registrar, his second marriage was valid, and therefore he should have cancelled his first marriage to avoid bigamy. Last but not least, a deaf person who could not take an oath could nevertheless testify even if technically he could not be considered a witness. This procedural standpoint regarded the mimic account of a deaf person as a valuable piece of evidence that could help resolve a case. The highest goal of justice thereby challenged the existing hierarchy of the different forms of language as long as some form of expressing a thought, memory, or emotion could serve judicial truth.

Our article illustrates the fruitfulness of interdisciplinary approaches, such as combining legal, deaf, medical, and cultural history. While by the time of the late nineteenth century, deaf education had embraced a scientifically-medical approach that placed hearing culture and vocal speech at the top echelon of human society, the law, in attempting to define mainstream society and even upholding societal values like the institution of marriage, moved away from medical approaches of deafness. It meant that, even if they did not realize it, the courts viewed deafness also as a cultural phenomenon, which illustrates that deaf history in Germany is more multi-faceted than one might think. Alternative trends may be found that point to acknowledging a deaf culture with a unique language as distinct from the hearing mainstream. An examination of deaf history merely from medical, scientific, technical or educational perspectives would not have yielded such an insight. In other words, deaf history can benefit from different hearing perspectives. Such an open-minded hearing input illustrates that even

at a time when educators of the deaf called for the oral method and complete assimilation of deaf persons into the hearing world, it was practically impossible and not even desirable to attain this goal of hearing uniformity and a predominance of speech, since gestures and mimic expressions could at times be more useful than the spoken word. There was, and is, more to communication than speaking and hearing, and at times the nonverbal, gestures, a signed language become even more instrumental than a spoken or written description in finding truth and justice.